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COURT OF APPEALS
DIVISION II

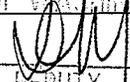
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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY


DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

COVELL THOMAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 99-1-00397-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show a double jeopardy violation when he remained in continuing jeopardy after his successful appeal and when the double jeopardy clause does not apply in non-capital sentencing proceedings?
2. Should this court uphold the second jury's finding of aggravating circumstances?
3. Should this court reject the premise underlying many of defendant arguments –namely that the State had to prove defendant personally intended to commit murder in order to convict him of aggravated murder- as it is unsupported by Washington law?
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6. Should this court depart from Division I's analysis in Howerton, as its construction of RCW 10.95.020 fails to take into account differences in the language used to set forth the various aggravating circumstances?
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13. Did defendant fail to preserve any claim of error that certain evidence was improper 404(b) evidence when he did not object on that basis in the trial court?

14. Has defendant failed to show that he was entitled to relief under the cumulative error doctrine when he has not shown any prejudicial error, much less an accumulation of it?

B. STATEMENT OF THE CASE.

1. Procedure

This appeal marks the second time this case has been before the appellate courts.

The Pierce County Prosecutor's Office charged, COVELL PAUL THOMAS (defendant), with one count of aggravated murder in the first degree, residential burglary, and unlawful possession of a firearm in the first degree. CP 1-4. The State alleged the aggravating factors of the murder being committed in the course of, furtherance of or in immediate flight from a robbery in the first or second degree or a residential burglary, and that the murder was committed to conceal the commission of a crime or the identity of the person committing the crime, contrary to RCW 9A.32.030(1)(a) and RCW 10.95.020(9) & (11). CP 1-4. The matter proceeded to trial; defendant was convicted as charged and the jury returned a verdict for death. Thomas, 150 Wn.2d 821, 830, 83 P.3d 970 (2003). Because of an erroneous accomplice liability instruction the court

vacated the death sentence and the jury's finding of aggravated circumstances, but found the error was harmless as to defendant's convictions for premeditated first degree murder, residential burglary, and firearm possession. Id. at 876. It remanded the case "for either a new trial on the aggravating factors or resentencing in accordance with [the] opinion. Id.; CP 5-77.

On remand the State opted to retry defendant on the aggravating factors, but not to seek the death penalty. The retrial of the aggravating circumstances occurred before the Honorable Sergio Armijo, the same judge that had presided of the original trial. RP 47-48.

There was considerable debate over the content of the instructions to the jury. CP 95-97, 98-119, 137-150, 151-166; RP 2-26, 78-109, 123-151, 1528-1596. Ultimately, the court decided adopt the state's proposal which was to inform the jury that defendant had been found guilty of premeditated murder in the first degree but also instructed the jury that it was not to "consider the finding of guilt of premeditated murder in the first degree as proof of the aggravating circumstances." RP 62, CP 178-201. The jury was not instructed on the existence of defendant's convictions for burglary or unlawful possession of a firearm. Id.

After hearing the evidence, the jury found the existence of four aggravating circumstances. CP 202. The court sentenced defendant to the mandatory sentence of life without the possibility of parole. CP 205-214.

Defendant filed a timely notice of appeal from entry of this judgment. CP 215.

2. Facts

Richard Geist hired defendant in January or February of 1998 to do janitorial work. RP 190-191. The two became friends and would often socialize after work. RP 192-194. The two talked about the defendant setting Geist up with a girl. RP 195.

Shortly after he was hired, in March of 1998, defendant started telling his girlfriend, Lynette Ducharme, that he wanted to rob his boss. RP 200-201. Defendant was aware that Geist was getting paid a lump sum of about \$5,000 at the end of the month and that Geist did not keep his money in a bank. RP 201-202-211. Ultimately, Geist was paid \$5,566.20 on March 27, 1998, and cashed the check. RP 780-782, 790-793.

The plan was to have one of Lynette's girlfriends go on a date with Geist and take him to a prearranged location where the robbery would occur. RP 207. Lynette asked defendant what would keep Geist from recognizing him and defendant replied that he would wear a mask so that Geist would not recognize him. RP 207. Later defendant stated that he might have to shoot him. RP 208. Defendant continued to talk frequently about his plan. RP 202. Defendant suggested names of girls that might assist with this plan including Lynette's sister, Sandy Ducharme. RP 208-209. He also talked about getting Ed Rembert to help. RP 209.

Approximately two weeks to a month before the murder the defendant approached his childhood friend, Horyst, to see if he would like to assist in the robbery. RP 337-339 343-346. Specifically, defendant asked Horyst if he would like to “rob his boss.” RP 346. Horyst declined after he learned that the defendant “might have to kill the dude.” RP 346-347.

The day of the murder or shortly before, the defendant asked Sandy Ducharme to go on a date with Geist. RP 594-595. Defendant told her that it was Geist’s pay day and that she would get some of the money. RP 595-597. She declined the invitation but asked him how he was going to disguise himself. RP 599. The defendant and Lynette were at Sandy’s apartment on the day of the murder. RP 600.

Lisa Rodin is a former friend of the defendant. RP 451-452. On the day of the murder the defendant called Lisa. RP 453. The defendant asked her if she would help defendant “set him up” so he could beat up Geist and rob him. RP 453. Defendant explained that all she would have to do is meet Geist somewhere, he would give her \$200, and the defendant would beat him up and rob him. RP 453-454. Lisa declined. RP 454. Defendant then asked her to call Geist’s number “three-way” call. RP 454. She called Geist’s number but no one answered. RP 454-455. She then switched to defendant’s line to inform him. RP 454-455. The Sunday following the murder the defendant called her and said that Geist was dead. RP 452.

Defendant asked his friend Edward Rembert to help in the robbery. RP 209. Approximately one week to two days before the murder, defendant told Lynette that Rembert agreed to work with him. RP 209.

Day of Homicide

The morning of the homicide Geist picked up his check for \$5,566.20 and went to get it cashed. RP 780-782, 790-793. That afternoon, Lynette saw Geist at her mother's house where he had come to pay defendant. RP 212-213.

Defendant told Lynette that he and Rembert were going to take Geist out that night to meet some girls. RP 214. This was a ploy and the real plan was to rob him. RP 214. Later afternoon or early evening, defendant called Geist from Sandy Ducharme's and Wendy Lakas's home phone to make sure that they still had plans for later that evening. RP 216-217, 466-468. Lynette testified that defendant would page someone and leave a number put in a code "54" after the number to indicate that it was him. RP 219.

At approximately 6:30 or 7:00 p.m. on the day of the murder Rembert and Troy Frank picked up their friend Kristy Frunz from her workplace to take her home. RP 753. Shortly after the three of them arrived home the defendant pulled up in Lynette's car. RP 754. Defendant wanted Rembert to go somewhere with him. RP 754-755. Kristy did not see Rembert again that night. RP 756. Kristy's sister,

Stacie, came home around 9:00 – 9:30 that evening. RP 739. Kristy was not home at the time. RP 739. Shortly after Kristy arrived home she received a phone call from Rembert. RP 739. Her caller ID stated that he was calling from Richard Geist's home. RP 742. Rembert asked for Troy Frank but Troy was not home. RP 742. According to Stacie, when Troy arrived home he called Geist from her phone. RP 743.

Later in the evening Lynette and defendant drove her white Plymouth Sundance to pick up Rembert to go rob Geist. RP 214-216, 222. Azevedo recalls that Lynette came over to her home around 7:00 or 8:00 and wanted her to come home with her. RP 1013-1015. When Azevedo got out to Lynette's car, defendant and Rembert were inside. RP 1015.

Lynette testified that before dropping defendant and Rembert off, they all went to Lynette's mother's home. RP 214, 223. Defendant and Rembert went into a bedroom alone to talk and drank a 40-ounce Old English beer. RP 214, 223. When it was dark they all got in the car and Lynette dropped off Rembert and defendant near Geist's home in Titlow. RP 222-228. Azevedo recalls that the women dropped off defendant and Rembert on a dark road in the Titlow Beach area. RP 1015-1017. Lynette was told to wait for a call from defendant. RP 231.

The women went back to Lynette mom's house and played on the computer. RP 1018-1019.

The Murder

Raymond Cool was working security at Tacoma Baptist School on the day of the murder. RP 490-491. At approximately 10:30 p.m., Mr. Cool arrived at the campus to perform his rounds and lock up the building. RP 502-503. Mr. Cool does not wear a uniform but takes his dog, a flashlight, and a bat with him. RP 492, 504. His dog alerted him to trouble. RP 506. Mr. Cool came around the corner of the building where his dog was growling and saw a man zipping up his pants. RP 506-508. There was a wet spot on the ground in front of the man and a can of Old English 800 beer. RP 508-509. It appeared that he had caught the man urinating. RP 509. The man was a slender black male approximately six feet tall. RP 509. There was a van right behind the man and the back sliding door was open all the way. RP 509. Mr. Cool tried to use his flashlight to illuminate the area but this seemed to make the situation more hostile and he pointed his flashlight down. RP 50-512. The van was not running and there were no lights on inside the vehicle. RP 510. Mr. Cool informed him that this was private property and he had no right to be there. RP 511. The man was "very, very scared," particularly of his dog. RP 511.

Mr. Cool also heard a voice coming from the back of the van and assumed the person was seated behind the driver. RP 511-512. He could not see the driver's seat area. RP 512. The voice sounded like that of a black male. RP 514. There was no one in the front passenger seat of the

van. RP 510. The voice sounded angry and challenged Mr. Cool as to who he was and what right he had to confront them. RP 511-514. Mr. Cool informed them he was the security guard. RP 514. The voice then asked Mr. Cool where was his badge. RP 515. Mr. Cool became scared at this point. RP 516. He told them one more time that they had to leave. RP 517. As Mr. Cool left the area he saw the van back down the hill and head west on 64th. RP 517. Mr. Cool followed the vehicle and saw that it did not leave but instead parked out on the street. RP 518-521.

Mr. Cool heard a huge commotion coming from the direction of the van. RP 522. It sounded as though someone was beating on the van with a steel pipe. RP 522. It then occurred to Mr. Cool that the sound he was hearing was gunshots. RP 522. He heard approximately three to four shots. RP 522. Mr. Cool ran from the area to a classroom where he called police within 60-90 seconds of the shots being fired. RP 523-524. Mr. Cool went back to see where the vehicle was and observed it slowly driving down the road, west on 64th street. RP 525-526.

Police arrived and surveyed the area but did not stop and talk to Mr. Cool. RP 528-529. Mr. Cool went home and then came back later to check the area. RP 530. Days later he found an Old English 800 Malt Liquor container in the bushes and notified the police. RP 536. The police recovered the container. RP 536, 763-764. Police presented Mr. Cool with a photomontage on a later date, but he was unable to identify a

anyone as the man he saw outside the vehicle. RP 534-536, 1280-1285.

The montage included a photo of defendant but not of Rembert. RP 1285.

At approximately 10:15 on the evening of the murder, Jody (Ludwig) Kroenert was standing outside her home at 6403 South Prospect when she heard three to six gunshots. RP 440-443. She then heard a car driving really fast. RP 443. The next day she saw police and a body on the side of the road. RP 444-446. The body was in the general location where she heard the gunshots at approximately 10:15. RP 446.

The following morning Chief Medical Examiner John Howard was called to the scene of the body at Tacoma Baptist School. RP 906-907. Dr. Howard estimated the time of Geist's death to be between 10-10:30 on March 27, 1998. RP 948. There was evidence of blood staining on the skin surface and clothing. RP 912. Rigor mortis had set into the body evidencing that Geist had been dead for hours. RP 909-911.

Dr. Howard determined that the cause of death was multiple gunshot wounds to the head. RP 946. The first wound's point of entry of bullet was from behind and from the right. RP 919. The bullet struck the ear, tore it, continued through the ear into the canal and penetrated into the head. RP 919. Stippling was present and indicated that the shot was fired from less than three feet. RP 924-925. A second gunshot wound was located on the right side of the neck in the back area. RP 919. No stippling was present at this wound site. RP 927. A third and fourth gunshot wound were located on the back of the head and neck. RP 919-

920. Again, no presence of stippling. RP 927. Dr. Howard opined that the wounds were consistent with Geist's head being turned toward the driver's window at the time of the shooting, if he was seated in the driver's seat and the shot came from behind. RP 936.

The Burglary

Around 11:15 p.m. Geist's neighbors Suzanne Sukauskas and Jameson McDougall heard Geist's van come skidding up to the duplex. RP 638, 650-653, 683. They heard someone jingling keys, trying to get into the front door of Geist's home and assumed it was Geist coming home. RP 653. It sounded as though he was having problems with the lock because he was fumbling with the keys. RP 653. McDougall believed that the person tried three to four keys before getting in. RP 683. The door opened and then shut loudly. RP 649, 654, 684. Geist was always a very courteous neighbor and mindful of the noise since his neighbors had a small child. RP 649-650. Geist never slammed the door because of the baby. RP 650, 664, 678. McDougall knew this person could not be Geist. RP 684.

The Getaway and Burning of the Van

Defendant called Lynette later that night and indicated that something bad had happened. RP 230-232, 1020. Defendant asked her to pick them up down the street from Geist's home. RP 232. Azevedo recalls that Lynette seemed in a hurry after the call. RP 1020-1021. They

both got in the car before even putting their shoes on and went to pick up defendant and Rembert. RP 1021.

Meanwhile, Cedric Walker, a friend of Geist's, arrived at Geist's house as they had agreed earlier in the day. RP 1122-1128. Walker left Vancouver at around 8:30-9:00 p.m. and arrived at Geist's home driving a late 80's, red Volvo. RP 1128-1129. When he arrived at the residence he noticed Geist's van was outside. RP 1131-1132. He went up to the duplex and knocked on Geist's door but no one answered. RP 657, 1133-1134. Neighbors heard Walker knocking. RP 655-656, 687. Walker looked confused. RP 687. Walker thought he saw movement in the home. RP 1134. Walker called out to Geist and spent several minutes at the door before he decided to go find a pay phone to call him. RP 1135.

When Lynette arrived at Geist's house she saw a man knocking at the front door. RP 233, 235. At that time Walker left the home. RP 688, 1135. Just after Walker left, the neighbors heard two people race from the front door to the van and heard two doors slam in the van. RP 659, 685. McDougall looked out the window and saw two individuals, neither of whom appeared to be Geist, leaving in the van. RP 689. The vehicle headed towards Titlow Park. RP 690. Less than two minutes later Geist's phone rang. RP 691. Neighbors saw that behind the van was a small economy car moving at the same speed. RP 705.

Within five minutes the neighbors saw a maroon Volvo pull up, stay less than a minute, and leave. RP 691.

Walker was at a nearby payphone and saw Geist's van leaving. RP 1136-1137. Walker got into his car to follow. RP 1138. Walker recalls seeing an economy car following the van. RP 1138. The car had two young, light haired, Caucasian women in it. RP 1138. Walker pulled up alongside Geist's van. RP 1139-1140. He saw the driver was wearing a starter jacket with a hood. RP 1143. The driver appeared to be a light-skinned African American male. RP 1149. There was a smaller passenger on the other side. RP 1142. The driver was not Geist. RP 1142. Walker continued to follow the van down Jackson Avenue and tried to get a look at the passenger. RP 1143. The passenger would not look at him and was covered up just like the driver. RP 1144. Walker stopped and called Geist from a pay phone and left a message. RP 1148. Walker returned to Geist's home to verify the van was gone. RP 1146. Walker left and called Geist one more time, leaving a message. RP 1148.

Azevedo testified that as she and Lynette were waiting for defendant and Rembert that a black van drove by and Lynette started to chase it. RP 1023. Lynette saw that Walker's car was following the van as defendant drove. RP 236-237. Walker's car then drove off in another direction; she and defendant pulled their vehicles off to the side of the road a short time later. RP 240, 1024-1025. Defendant rolled down the window and asked her to think of a place where he could get rid the van. RP 240-241, 1025. Azevedo realized that defendant was driving the van and Rembert was in the front passenger seat. RP 1025.

Lynette drove to Gig Harbor and defendant followed. RP 241-242, 1027. She drove to a wooded area. RP 242. Defendant pulled into a gravel area; Lynette pulled over nearby. RP 246-247, 1028. When defendant approached her vehicle Lynette noticed that the defendant's clothes appeared soaking wet. RP 250-251. Azevedo testified that defendant's clothes looked like they had wet paint on them. RP 1035. Azevedo recalled that defendant seemed anxious and was looking for a lighter or matches. RP 1032-1033. Defendant looked for a lighter in her car, saying he going to burn the van. RP 1033. Defendant asked for something to ignite a fire. RP 247. Lynette gave him a bottle of perfume from her purse. RP 248. He also took Azevedo's coat. RP 248, 1034. Defendant broke the bottle of perfume open over the coat, lit the coat, and threw the coat in the side door. RP 249-250.

All four of them left in Lynette's car. RP 248-250. Defendant and Rembert were covered in blood. RP 251-252. Defendant sat in the front passenger's seat and Rembert sat in the back; both sat on CD casings or clothes to keep blood off from the seats. RP 251. Both Lynette and Azevedo recalled that defendant laughed a "crazy laugh." RP 250, 1039.

Rembert appeared scared. RP 1035-1038. His leg was cold and shaking like he was in shock. RP 1038. Azevedo had never seen Rembert in this condition before. RP 1036. Rembert was crying. RP 1039. Azevedo leaned toward him and he said, "Covell shot him, he shot him." RP 1047.

Lynette drove them back to Azevedo's house. RP 252-253, 1048. As soon as they got home defendant and Rembert went into the bathroom. RP 1048. Azevedo went to get them some soap. RP 1049. Rembert and defendant changed out of their clothes. RP 253, 1049-1050. Defendant had a wad of money; he handed Rembert some, but kept most of the money for himself. RP 255-256. Later the defendant told Lynette that some of the money came from Geist and some came from Geist's home. RP 255. Defendant told them that they should all keep quiet. RP 256. Defendant and Rembert placed the clothing in a bag and Lynette and defendant dumped the clothing off on the way to Lynette's mother's. RP 254, 256-257. Defendant disposed of his shoes by Mount Tahoma High School because they had blood on them. RP 257-259. Lynette identified at trial the shoes recovered by police at that location. RP 259, 852-854. A small amount of blood was located on the shoes but there was not enough of a sample to conduct DNA testing. RP 1364-1371.

Later, Lynette and defendant traveled to his mother's house. RP 259. As they traveled, Lynette asked if it happened quick and he stated "Yeah." RP 262. Lynette did not believe Geist was actually dead so defendant said he would show her where Geist's body was. RP 261. He directed her to Tacoma Baptist School where she saw a body lying on the side of 64th Street, across from the school. RP 267. Defendant said "that's Richard." RP 267. Lynette confirmed at trial where the body was located. RP 267.

After the homicide Lynette and defendant rented a hotel room. RP 268. At this time defendant asked her to marry him. RP 271-272. The couple were married in August 8, 1998, three months after the birth of their son, Savon. RP 182-183, 272. Azevedo recalled that the day after the homicide the defendant called Rembert and asked if Azevedo was going to keep her mouth shut. RP 1053.

Sometime after the wedding of defendant and Lynette, Lynette told Sandy and Alli Wright what had happened. RP 275, 377-382, 603-604. Lynette was crying hysterically and was upset. RP 604. She was afraid for her life and wanted Sandy to know who did it in case he ever tried to kill her. RP 606.

Lynette did not go to the police initially to tell them what happened because she was scared. RP 272. Defendant threatened her more than once. RP 272-273. On one occasion the defendant threatened to kill her and their son if she ever said anything or left. RP 274. Defendant also warned her not to talk about the crime. RP 274. He told her that if she told, he would kill her sister Sandy Ducharme. RP 274. Defendant also told her that if she spoke to the police she should tell them that they were at her mom's all night. RP 273-274. Later Lynette would tell the police just that. RP 273.

Investigation

Ms. Janet Roach was on her way to work at approximately 6:10 a.m. on March 28, 1998. RP 173-174. As she was driving passed Tacoma Baptist School, and she saw a dead body laying just off the roadway. RP 176-177. The man was sprawled on his back. RP 177. She returned to her home to call 911 and asked her husband to go the scene and wait for aid units to arrive. RP 177-178.

Officer Gwen Beverly was the first officer to respond to the scene. RP 407-410, 424. Fire was already on the scene and confirmed that Geist was dead. RP 410-411. Geist's body was located on the north side of 64th Street. RP 411. Officer Beverly observed drag marks on the ground and it appeared that Geist's body had been dragged from the curb to where he was laying. RP 413-417, 419. There also appeared to be two separate sets of footprints walking to and from the body. RP 414, 422-424.

Captain Meinema located Geist's pager approximately 75 feet off from the sidewalk where the body was found. RP 986-993, 1214. The pager was within throwing distance of the street. RP 997. There was blood on the pager. RP 1214. The numbers on the pager were recorded as well as some of the times that they were received. RP 1201, 1215-1219.

Evidence technician Officer Creek documented bloody shoe prints in the area of the body. RP 813, 821-831. There were also bloodstains located on the curb and up into the parking strip area near where the

victim was located. RP 821-832. He documented drag marks located from the curb leading up to the victim's foot and also blood. RP 832.

Fire responded to a vehicle burn call at 12:14 a.m., Saturday morning. RP 883-884. Geist's van was located in Gig Harbor at Burnham Drive Northwest. RP 4884. At this point the van was fully engulfed in flames. RP 884-885. Fire fighters began to extinguish the fire. RP 886-887. The van was burned excessively and had been reduced to a metal frame. RP 887. Lieutenant Wiltbank found the circumstances of the fire suspicious since the van was located off the road quite far and no owner showed up to the scene. RP 888. Gig Harbor police arrived at approximately 12:30 a.m. RP 888.

Forensic technician Margeson and Detective Werner carefully searched the van for any possible pieces of evidence. RP 1289-1292. The men had to fill buckets with the debris and then sift through the contents. RP 1292-1294. On the driver's side front floorboard area Margeson located what appeared to be a jacket of a bullet and a shell casing. RP 1294. The bullet jacket was confirmed to be a fired bullet jacket that was probably fired from a .38 or .357 Magnum revolver. RP 1319-1332. Bullet fragments found in the victim's head had the same characteristics and were likely fired from the same weapon, although forensics could not be certain. RP 932-933, 1319-1332. Around this time of the homicide, Lynette saw the defendant with a .38 revolver. RP 245

Fire Marshall Floyd Keller examined the van to determine the origin of the fire and other characteristics of the fire. RP 953. Based on his investigation it was his belief that the fire started in the right front passenger compartment. RP 954. Mr. Keller was unable to locate any evidence of flammable liquids. RP 959-960. He was able to rule out that the fire was caused by any kind of electrical problem and deduced that the fire was intentionally set. RP 957-959.

Police searched Geist's home. Bloody shoe prints were found outside Geist's home. RP 838, 842. There were also bloody shoe prints on the tile floor in the kitchen. RP 839, 843. Later DNA testing confirmed this was consistent with the victim's blood. RP 1238-1243, 1358-1368. Bloodstains found in bathroom sink were also confirmed to be the victim's blood. RP 843, 1238-1243, 1358-1368. There was also blood noted on the corner of the wall as you enter the bedroom. RP 843, 845. Officers noticed that a dresser adjacent to the bedroom was opened and the contents were spilled out on the floor next to the bed. RP 839. A file cabinet drawer in the bedroom was also open. RP 845. Geist's bedroom area was dusted for fingerprints but no identifiable prints were recovered. RP 846.

Defendant did not present any evidence.

C. ARGUMENT.

1. THE DOUBLE JEOPARDY CLAUSE IS NOT VIOLATED BY A RETRIAL OF AGGRAVATING CIRCUMSTANCES IN A NON-CAPITAL SENTENCING PROCEEDING AFTER AN APPEAL.

The protection against double jeopardy is found in the Fifth Amendment to the United States Constitution and states: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...” The corresponding provision in the state constitution is found at Const. Art. 1, § 9, which declares: “no person shall be... twice put in jeopardy for the same offense.” Washington courts have long held that the language of the state constitution receives the same interpretation as that which the United States Supreme Court gives to the jeopardy provision of the federal constitution. State v. James, 36 Wn.2d 882, 897, 221 P. 2d 482 (1950) (“The provision quoted from the constitution of this state affords appellant the same protection that he could claim under the Federal constitution.”); State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959)(A comparison of the provisions found in the United States constitution and our state constitution with regard to double jeopardy, reveals that the two are identical in thought, substance, and purpose.”); State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (“We conclude the Gunwall factors do not support [a] contention that the state double jeopardy clause provides broader protection to criminal defendants

than the federal double jeopardy clause. We hold Const. art. I, § 9 is given the same interpretation the Supreme Court gives to the Fifth Amendment.”).

The United States and Washington constitutions each provide that a defendant cannot be placed in jeopardy twice for the same *offense*. State v. Ahluwalia, 143 Wn.2d 527, 535-36, 22 P.3d 1254 (2001). Accordingly, double jeopardy under either constitution protects the accused against three possible events: 1) a second prosecution of an offense following an acquittal; 2) a second prosecution of an offense following a conviction; and 3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Assuming a court has jurisdiction over a case, jeopardy will attach in a jury trial when the jury is sworn and, in a bench trial, when the first witness is sworn. State v. Corrado, 81 Wn. App. 640, 646, 915 P.2d 1121 (1996). Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final, but not with a conviction that a defendant successfully appeals. Id. at 646-647. A second trial following a successful appeal is generally not barred, however, because the defendant's appeal is part of the initial jeopardy or “continuing jeopardy.” Id. at 647. Thus, the successful appeal of a judgment of conviction will not prevent further prosecution on the same charge unless the reversal was based upon insufficiency of the evidence. Id. at 647-648. Similarly, a retrial following a “hung jury” does not normally violate the

Double Jeopardy Clause because this is another instance of continuing jeopardy. Richardson v. United States, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).

Double jeopardy principles generally do not apply to sentencing matters, except in capital proceedings. In Monge v. California, 524 U.S. 721, 724, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), the United States Supreme Court addressed whether the Double Jeopardy Clause, which it had previously found applicable in a capital sentencing context in Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), should be extended to non-capital sentencing proceedings. The Court took the case to resolve a conflict that had been developing among the state and federal courts as to whether double jeopardy principles announced in capital cases also applied to non-capital sentencing proceedings. At issue in Monge was a recidivist sentence under California law. Monge waived his right to a jury determination on the sentencing issues and submitted the question to the court. The trial judge considered the prosecution's evidence supporting the sentencing allegations, found them to be true, and then imposed the appropriate sentence. On appeal, the California Court of Appeals found that the evidence presented was insufficient to show that Monge's prior conviction was a qualifying prior conviction under the statute. It vacated the sentence and ruled that retrial on the allegation would violate double jeopardy principles. The California

Supreme Court reversed the Court of Appeals ruling on double jeopardy and held that the prosecution could seek to retry the sentencing allegation.

When this issue reached the United States Supreme Court, it concluded that the double jeopardy clause does not preclude retrial on a sentencing allegation when sentencing a defendant convicted of a non-capital offense. Monge, 524 U.S. at 729. The court noted that, historically, it had found double jeopardy protections inapplicable to sentencing proceedings “because the determinations at issue do not place a defendant in jeopardy for an ‘offense.’” Monge, 524 U.S. at 728. The court characterized its holding in Bullington as “a ‘narrow exception’ to the general rule that double jeopardy principles have no application in the sentencing context.” Monge, 524 U.S. at 730. The Supreme Court explained that:

[S]entencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal . . . Where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt.

Id. at 729 (internal citations omitted).

It is well settled in Washington that the determination of the existence of an aggravating factor under 10.95.020 relates to sentencing and is not an element of the offense. Although commonly referred to as “aggravated first degree murder” or “aggravated murder” Washington’s

criminal code does not contain such a crime in and of itself; the crime is premeditated murder in the first degree accompanied by the presence of one or more of the statutory aggravating circumstances listed in RCW 10.95.020. State v. Roberts, 142 Wn.2d 471, 501, 14 P.3d 713 (2000); State v. Irizarry, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). The court in Kincaid explained it as follows:

In the statutory framework in which the statutory aggravating circumstances now exist, they are not elements of a crime but are “aggravation of penalty” provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense. The crime for which the defendant was tried and convicted in connection with the death of his wife was premeditated murder in the first degree, and the jury was correctly instructed as to the elements of that offense. The penalty for that murder was properly enhanced to life imprisonment without possibility of parole when the jury unanimously found by a special verdict that the existence of a statutory aggravating circumstance had been proved by the State beyond a reasonable doubt.

Kincaid, 103 Wn.2d at 312.

In this case, the court is faced with a man who was found guilty of one count of premeditated murder by the first jury. The first jury returned a special verdict form that was signed by the foreman and which read:

We, the jury, having found the defendant guilty of murder as defined in Instruction 15 make the following answers to the questions submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

(1) Did the defendant or an accomplice commit the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime?

ANSWER: (Yes/No) Yes

(2) Was the murder committed in the course of, in furtherance of, or in immediate flight from robbery in the first degree?

ANSWER: (Yes/No) Yes

(3) Was the murder committed in the course of, in furtherance of, or in immediate flight from robbery in the second degree?

ANSWER: (Yes/No) Yes

(4) Was the murder committed in the course of, in furtherance of, or in immediate flight from residential burglary?

ANSWER: (Yes/No) Yes

(signed)
PRESIDING JUROR

CP 246. This special verdict asks the jury to determine whether “aggravation of penalty” circumstances exist. The first jury unanimously concluded that four circumstances did exist. Defendant appealed his conviction and sentence. He was successful in overturning his sentence and the finding of aggravating circumstances due to instructional error, but

his conviction for premeditated murder was affirmed. CP 5-77; State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). The case was remanded for further proceedings. Id. Defendant's case could be remanded without violating double jeopardy for two reasons. This first rationale is because defendant remained in continuing jeopardy for these sentencing aggravators after his successful appeal. See, Corrado, supra.

Upon retrial the State did not seek the death penalty; the second jury returned a special verdict form that answered "yes" as to whether the State had proved beyond a reasonable doubt to essentially the same four aggravating circumstances as presented in the first trial. CP 202. Even if the State had been seeking the death penalty on retrial, this proceeding would not have violated double jeopardy. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003); Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986).

In Sattazahn the court explained that in a capital context the prosecution essentially has the burden of proving the equivalent of "murder plus one or more aggravating circumstances" and that this is essentially a distinct offense from simple murder. When a jury unanimously concludes that the prosecution failed to meet its burden of proving the existence of one or more aggravating circumstances in a capital case, then double-jeopardy protections will attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)" and the prosecution will be precluded from ever seeking the death penalty

again. Sattazahn, 537 U.S. at 112; Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). When the trial court dismissed Sattazahn's jury as "hung" and entered a life sentence in accordance with Pennsylvania law, neither judge nor jury "acquitted" him of the greater offense of "first-degree murder plus aggravating circumstance(s)." Thus, when Sattazahn "appealed and succeeded in invalidating his conviction of the lesser offense, there was no double-jeopardy bar to Pennsylvania's retrying petitioner on both the lesser [(murder)] and the greater offense [(murder plus aggravating circumstance(s))]; his 'jeopardy' never terminated with respect to either." Sattazahn, 537 U.S. at 113. Here the first jury could agree and found that aggravating circumstances did exist. Resubmitting a determination of these factor to a second jury on remand does not violate double jeopardy.

Just as the failure of a jury to agree on whether aggravating circumstances apply will not preclude retrial on "murder plus aggravating circumstance(s)," neither does a jury determination that some, but not all, of the alleged aggravating circumstances apply. In Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed00. 2d 123 (1986), two defendants were found guilty of first-degree murder and sentenced to death. Poland, 476 U.S. at 149. At the sentencing hearing, the State alleged that the following aggravating circumstances were present: (1) that defendants had "committed the offense as consideration for the receipt, or in expectation of the receipt, of [something] of pecuniary value," and (2) that

defendants had “committed the offense in an especially heinous, cruel, or depraved manner.” Id. The sentencing court found that only one aggravating circumstance was present. Id. The defendants successfully challenged their convictions and death sentences on appeal. On remand, they were again convicted of first degree murder. The State argued the same two aggravating circumstances as in the first trial plus an additional aggravating circumstance. Poland, 476 U.S. at 149-150. The second sentencing court found all three aggravating circumstances were present and sentenced defendant to death. Id.

The matter went to the United States Supreme Court on whether the trial judge’s rejection in the first trial of one of the aggravating circumstances was an “acquittal” of that circumstance for double jeopardy purposes. The court answered that it was not. Poland, 476 U.S. at 157. It stated:

We reject the fundamental premise of petitioners’ argument, namely, that a capital sentencer’s failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an “acquittal” of that circumstance for double jeopardy purposes. Bullington indicates that the proper inquiry is whether the sentencer or reviewing court has “decided that the prosecution has not proved its case” that the death penalty is appropriate. We are not prepared to extend Bullington further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which Bullington is based past the breaking point.

Poland, 476 U.S. at 155. The United States Supreme Court does not view each aggravating circumstance as being a separate penalty or offense when the prosecution is required to prove “murder plus aggravating circumstance(s).” Thus, the finding of any particular aggravating circumstance does not of itself “convict” a defendant, and the failure to find any particular aggravating circumstance does not “acquit” a defendant. Only when there is a determination on the merits that no aggravating circumstance applied to defendant’s crime has there been an “acquittal” that would bar a second death sentence proceeding.

In this case, defendant’s first jury found the existence of four aggravating circumstances and his second jury again found the same four circumstances applied. Under the principles set forth Sattazahn and Poland, defendant could not show a double jeopardy violation even if the first and second trials had both been capital proceedings.

Because the second trial was *not* a capital proceeding, defendant faces an even more insurmountable barrier to raising a double jeopardy claim. Under Monge, the double jeopardy clause is not applicable to non-capital sentencing proceedings. Defendant cannot assert a double jeopardy violation because he was back before the court in a sentencing proceeding for a jury to determine aggravating circumstances in a non-capital case—a situation to which the double jeopardy clause does not apply. Thus, double jeopardy principles did not bar a second jury in a

non-capital sentencing proceeding from determining whether aggravating circumstances existed.

2. THIS COURT SHOULD UPHOLD THE SECOND JURY'S FINDING OF AGGRAVATING CIRCUMSTANCES.

- a. Under Washington law all participants in a premeditated murder are equally liable for the substantive crime regardless of the degree of their participation and all may be held accountable for aggravated murder upon a finding of an aggravating circumstance; defendant's guilt for the substantive crime was conclusively established in the first appeal.

A person is legally accountable for the conduct of another person if he is an accomplice to that person in the commission of the crime. State v. McDonald, 138 Wn.2d 680, 690, 981 P.2d 443 (1999) (quoting State v. Davis, 101 Wn.2d 654, 657, 682 P.2d 883 (1984)); see also, RCW 9A.08.020. A person is an accomplice to another in the commission of a crime if he or she solicits, commands, encourages, or requests the other person to commit the crime; or if he or she aids or agrees to aid such other person in planning or committing the crime. RCW 9A.08.020(3). An accomplice "need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal." State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003); State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991). Rather, general knowledge of "the

crime” is sufficient, State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2001); the accomplice need only intend to facilitate the commission of the crime by providing assistance through his presence or act. Id. at 502. Thus, the State must show the accomplice knew that his activity would promote or facilitate commission of the crime.

The Washington Supreme Court has held repeatedly that a defendant charged with murder in the first degree may be lawfully convicted upon principles of accomplice liability. E.g., State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001); State v. Cronin, 142 Wn.2d 568, 581-582, 14 P.3d 752 (2001); State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993); State v. Hoffman, 116 Wn.2d 51, 103-104, 804 P.2d 577 (1991); State v. Guloy, 104 Wn.2d 412, 413, 705 P.2d 1182 (1985). In all of these cases, the court either explicitly stated that a defendant may be convicted of murder in the first degree as an accomplice; or the court affirmed a conviction for a defendant convicted of murder in the first degree as an accomplice. Thus, it is beyond dispute that in Washington, a person, via accomplice liability, may be properly convicted of the crime of premeditated murder even though the person may not have personally engaged in any premeditation. A person so convicted is not any less guilty of premeditated murder than the person who engaged in the premeditation.

When speaking of guilt of the substantive crime, there is no distinction between the guilt of a principal and the guilt of an accomplice.

[W]e have made clear the emptiness of any distinction between principal and accomplice liability:

The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant.

State v. McDonald, 138 Wn.2d 680, 981 P.2d 443 (1999), quoting State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974). Thus, when a crime is committed by several participants, every single participant is liable for the nature of the resulting crime and the harm inflicted upon the victim of that crime regardless of which participant is directly responsible; this is because there is no distinction between their culpability under RCW 9A.08.020 for the substantive crime. Having been found guilty of premeditated murder, a defendant may also face increased punishment if the jury finds the existence of one or more aggravating circumstances. In fact, in Roberts, the court acknowledged that a person who is an accomplice to premeditated murder in the first degree may be executed in some circumstances. State v. Roberts, 142 Wn.2d 471, 502, 14 P.3d 713 (2001).

Permeating many of the arguments raised in appellant's brief runs an underlying premise that defendant cannot be properly convicted of aggravated murder unless a jury finds that he, and not his accomplice,

intended to commit murder. Brief of Appellant at pp. 20, 23-24, 27, 29-31, 34, 36. Defendant provides no authority for this contention because, this underlying premise is not supported by Washington authority.

The question of premeditation is an element of the substantive crime of murder in the first degree under RCW 9A.32.030(1)(a). It is not a component of any of the four aggravating circumstances alleged here. See, RCW 10.95.020(9), (11)(a)(c). Defendant's conviction for premeditated murder in the first degree was affirmed in his first appeal. State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). This court is precluded from reconsideration of defendant's guilt for premeditated murder in the first degree by the law of the case doctrine.

The law of the case doctrine has been codified in RAP 2.5(3)(c)(2):

(2) Prior appellate court decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

The doctrine has its roots in the Supreme Court decision in Greene v. Rothschild, 68 Wn.2d 1, 414 P.2d 1013 (1966); see also, State v. Worl, 129 Wn.2d 416, 918 P.2d 905 (1996).

Under the doctrine of "law of the case," as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are "authoritatively overruled." . . . Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one

party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

Greene, at 10.

In the prior appeal in this case, the Washington Supreme Court determined that defendant's conviction for premeditated murder should be affirmed because the instructional error was harmless beyond a reasonable doubt with regard to the substantive conviction. The evidence showed that defendant initiated the plan, recruited others to help him execute it, thought about killing Geist beforehand, and was known to Giest and could use their friendship to lure him into a trap. As the court concluded:

“ “[Thomas] was so entrenched as a major participant in the murder that his culpability cannot be lessened even *if* his accomplice pulled the trigger.”

State v. Thomas, 150 Wn.2d at 846 (brackets in original)(emphasis added). Defendant presents no argument that the Supreme Court was applying “a rule of law which is clearly erroneous” in this portion¹ of the decision. Thus, defendant's guilt of the substantive crime of premeditated murder is not subject to relitigation in this appeal under the law of the case doctrine.

¹ As will be discussed later in the brief, the Supreme Court did apply a “clearly erroneous” rule of law when it held that Apprendi errors were not subject to a harmless error analysis. But the Supreme Court's misapplication of the law of harmless error with respect to the determination of aggravating circumstance worked to the defendant's advantage; it does not provide him a basis for asking the court to reconsider the determination of his guilt for the substantive crime.

Defendant's liability for premeditated murder in the first degree is beyond dispute; it is also unaffected by whether he was a major participant who engaged in premeditation or a minor player who knew that he would be facilitating the commission of a premeditated murder but did not engage in premeditation or the actual killing himself. The jury on remand found beyond a reasonable doubt the existence of four aggravating circumstances with regard to his crime. CP 202. Defendant has been properly convicted of both components of aggravated murder and can properly be punished by imposition of a sentence of life without the possibility of parole. See, State v. Roberts, 142 Wn.2d at 502.

Defendant's contention that he cannot be punished for aggravated murder absent a determination that he intended to commit murder should be rejected as meritless.

- b. The court properly rejected the defense's proposed instructions as they inaccurately stated the law, were argumentative, assumed as true material facts in issue and addressed issues that were not before the jury for determination.

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for

abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by, State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. Id.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999) (citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996)). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

A trial court has considerable discretion in determining the exact language of jury instructions, the number of instructions to give, and whether a particular instruction should have been given. Enslow v. Helmcke, 26 Wn. App. 101, 104, 611 P.2d 1338 (1980). It is not error for a trial court to refuse to give a proposed instruction that is erroneous in any respect. State v. Hoffman, 116 Wn.2d at 110-111; Vogel v. Alaska

S.S. Co., 69 Wn.2d 497, 419 P.2d 141 (1966); Nor is it error to refuse to give an instruction if the subject is adequately addressed in another instruction which is given. State v. Hoffman, 116 Wn.2d at 110-111. Instructions may not be written so that they assume as true material facts which are in issue. Ashley v. Ensley, 44 Wn.2d 74, 265 P.2d 829 (1954).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing, State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963).

Defendant assigns error to the court's failure to give several of his instructions. Assignments of error 8-13, Brief of Appellant at p 1. Defendant took exception to the court's failure to give these instructions at trial. RP 1586.

Before setting forth the trial court's reasons for refusing these instructions, it is important to note that every one of the proposed alternatives to instruct on the "Defense Theory of the Case" was

objectionable as containing a misstatement of the law, improper argument, or both. The trial court's refusal to give these instructions could be upheld on this basis alone.

Except for the defense's Proposed Alternative Number 3-a (CP 174), every other proposed alternative instruction contained a statement articulating the defense's theory of the case. CP 170-173, 175-177. A defendant is entitled to instructions that allow him "to argue his theory of the case;" he is not entitled to an instruction that articulates his theory of the case to the jury.

Secondly, defense proposed alternatives 1, 2, and 3-a, each contain the statement that "The law does not allow for the motivation and intentions of one defendant to be attributed to another defendant." CP 170-174. As argued previously, supra, this is an inaccurate statement of Washington's law on accomplice liability. Each of these instructions was properly refused on that basis.

Finally, proposed alternatives 3-b, 3-c, and 3-d are objectionable because they assume as true material facts which are in issue. Each of these instructions asks the jury to determine whether the defendant shared the same intent or motivation as Rembert "when Rembert shot Richard Giest." CP 175-177. The State and defense have always been at odds over who pulled the trigger, therefore stating that it was Rembert as a matter of fact is improper. Again this provides sufficient basis for upholding the court's refusal of these instructions.

The court, however, refused to give the instructions for another reason; it found that the instruction were trying to place issues before the jury that had been resolved by the Supreme Court in the first appeal.

COURT: Supreme Court has said, no, instructions were wrong with regard to the aggravators, and maybe even to the underlying charge. But we're going to keep the premeditated murder conviction and we're going to let you do the aggravators again. That's where we're at and we're going to stick with that. He's been found guilty of premeditated murder. He's been found guilty of that part of it and I'm not going to find that because that's part of the instruction for the State, that for that reason it's improper.

Did the defendant commit murder? He has been found guilty of murder. And then the second part is, in the commission of a crime, to protect or conceal the identity of any person, or in furtherance or immediate flight from ...robbery first degree, robbery second, residential burglary. The first part is done. That's following the law that's been given to the Court by the Supreme Court.

I'm going to deny your instruction.

RP 1570-1571. The court properly analyzed the direction given in the opinion from the first appeal. The court refused the proposed instructions because they inaccurately put issues before the jury that were either resolved or unnecessary.² Defendant has failed to articulate why the Supreme Court was in error in affirming the substantive conviction based on harmless error or to present any argument as to why the law of the case

² At the trial court defendant proposed an instruction which required the State to prove that he was a major participant in the death of the victim. CP 170-171. Defendant does not pursue this claim on appeal.

doctrine does not bar his claim that defendant was not really found guilty of premeditated murder.

The trial court properly rejected all of defendant's proposed alternative instructions on the "defense theory of the case."

- c. The proceedings on remand complied with Apprendi/Ring/Blakely requirement that a jury find any fact that increases the penalty for a crime beyond the statutory maximum and well as the requirements of Division I's Howerton decision.

In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court applied the rule from Apprendi, that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 542 U.S. at 301 (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. Blakely, 542 U.S. at 303-04. When a judge imposes punishment that the jury's verdict alone does not allow, the jury has not found all the facts that the law makes essential to the punishment, and the judge exceeds his proper authority. Blakely, 542 U.S. at 304.

Washington's aggravated murder provisions were not impacted by Blakely/Apprendi line of cases, because a jury was always required to find the aggravated circumstance(s) beyond a reasonable doubt before any additional punishment could be imposed. State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982), vacated on other grounds by, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), aff'd on remand, 101 Wn.2d 631, 683 P.2d 1079 (1984).

In the case now before the court a jury was impaneled and instructed repeatedly that the State had the burden of proving the aggravating circumstance(s) beyond a reasonable doubt. CP 178-201, Instruction Nos. 2, 3, 22. The special verdict form also indicated this burden:

We, the jury, make the following answers to the questions submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

(1) Did the defendant commit the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime?

ANSWER: _____
(Yes/No)

(2) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the first degree?

ANSWER: _____
(Yes/No)

(3) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the second degree?

ANSWER: _____
(Yes/No)

(4) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from residential burglary?

ANSWER: _____
(Yes/No)

PRESIDING JUROR

CP 202. The jury answered each of these questions “yes.” The jury has found beyond a reasonable doubt the facts which increase the punishment. Therefore, the requirements of Blakely/Apprendi are satisfied and the court is authorized to increase the punishment imposed.

Moreover, this special verdict also directs the jury to focus on just the defendant and does not mention an accomplice. CP 202. Thus the instructions complied with the requirements of In re PRP of Howerton, 109 Wn. App. 494, 36 P.3d 565 (2001), which will be discussed further in the following section., *infra*.

Defendant contends that he may not be given a sentence of life without the possibility of parole because no jury has ever determined that he intended the death of Richard Geist. The erroneous nature of this premise has been discussed earlier. However, defendant further contends

that the decision of the Thomas Court - finding that the erroneous accomplice liability instruction was harmless with regard to the determination of defendant's guilt - is inadequate because it is essentially negated by the Thomas court's other holding that there is no harmless error analysis available on Apprendi error. Brief of appellant at pp. 23-24.

When the Supreme Court issued the opinion in the first appeal, it affirmed the conviction on the substantive offense of murder in the first degree using a harmless analysis and citing Neder v. United States. State v. Thomas, 150 Wn.2d at 844-846. However, it held that error with regard to the aggravating circumstance could not be found harmless as this type of error was not subject to a harmless error analysis. Id. at 849. Ultimately, the United States Supreme Court disagreed with this second holding.

Blakely/Apprendi errors are subject to harmless error analysis. Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006). There is no distinction between a failure to submit a sentencing factor to a jury and omitting an element in a jury instruction. Recuenco, 126 S. Ct. at 2552 (citing Apprendi v. New Jersey, 530 U.S. 466, 483-84, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). A harmless error approach is permitted because the error is not structural and does "not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Recuenco, 126 S.

Ct. at 2551 (quoting Neder v. United States, 527 U.S.1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1993)).

A constitutional error is harmless if “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) (quoting, Neder, 527 U.S. at 15 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967))). When applied to an element or factor not presented to the jury the error is harmless if that element is supported by uncontroverted evidence. Id. (Citing Neder, 527 U.S. at 18). After a thorough examination of the record the court must be convinced beyond a reasonable doubt that the jury verdict would have been the same absent the error. Id.

When there has been instructional error, there is no constitutional prohibition against using a harmless error analysis to uphold either a conviction on a substantive crime or on a jury determination of a sentencing factor such as an aggravating circumstance. Thus, contrary to defendant’s assertions, the errors of the first trial have not been carried forward in the sentencing hearings on remand. The jury’s findings of aggravating circumstances should be upheld.

- d. This court should not follow Division I's decision in Howerton as its analysis of RCW 10.95.020 is inadequate in that it has failed to take into account differences in the language used to set forth various aggravating circumstances.

As discussed above, “aggravated first degree murder” or “aggravated murder” does not exist as a crime in and of itself; the crime is premeditated murder in the first degree accompanied by the presence of one or more of the statutory aggravating circumstances listed in RCW 10.95.020. State v. Roberts, 142 Wn.2d at 501; State v. Irizarry, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). A person convicted of “aggravated murder” will either receive a death sentence or be sentenced to life without the possibility of parole. RCW 10.95.080.

Generally under Washington law, penalty enhancement provisions must depend on the accused's own misconduct rather than an accomplice's because the complicity statute found in RCW 9A.08.020(1) is “limited to accountability for crimes.” State v. McKim, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982). The court in McKim determined that under accomplice liability an accomplice is “equally liable only for the substantive crime.” McKim, at 117. The court's analysis was based on the fact that under RCW 9A.08.020, there is no strict liability for the conduct of another in regard to a sentence enhancement provision whereas the prior accomplice liability statute had imposed liability for punishment

as well. Thus, in any given case, the question is whether the Legislature is enacting a penalty provision intended to impose strict liability for all participants of a crime.

In assessing the penalty provisions contained within RCW 10.95, the Legislature envisioned that a person could be convicted of aggravated murder and face the death penalty even though he did not actually kill the victim. This intention is indicated by the following mitigating circumstance the jury is to consider in any special sentencing proceeding:

Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor.

RCW 10.95.070(4). Obviously, if the Legislature did not intend for accomplices to be convicted of aggravated murder, such a mitigating circumstance would be unnecessary.

Recently, Division I of the Court of Appeals was required to examine the nature of the aggravating circumstances in RCW 10.95.020 and determine how a jury should assess liability for these circumstances when there was more than one participant in the underlying premeditated murder. See, In re PRP of Howerton, 109 Wn. App. 494, 36 P.3d 565 (2001). The court in Howerton phrased the issue in this manner: “[D]id the Legislature intend to hold accomplices to murder strictly liable for the existence of aggravating factors or must the State prove the applicability of the factors to the individual defendant?” Howerton, 109 Wn. App. at

500. Division I answered its question by holding that an aggravating factor must be applicable to the individual defendant.

The State contends that the correct answer to the question posed in Howerton cannot be answered with either a “yes” or a “no.” Rather, the answer depends on which aggravating circumstance in RCW 10.95.020 is being considered.

The aggravating circumstances set forth in 10.95.020 cover a broad range of factors. Some of the circumstances pertain to the nature of the victim such as the murder of a law enforcement officer, firefighter, judge, juror, parole officer, prosecutor, or defense attorney. See, RCW 10.95.020(1), (8), (12).

Other circumstances pertain to the person who committed the murder, such as: a) the person was in prison or on escape status, RCW 10.95.020(2); b) the person either hired another to commit the murder for compensation or agreed to commit the murder for compensation, RCW 10.95.020(4), (5); or, c) the person was under a restraining order not to contact the victim, RCW 10.95.020(13).

Finally, some factors pertain to the circumstances of the crime such as the murder being committed in the course of a drive-by shooting, RCW 10.95.020(7) or the murder being committed in the course or furtherance of or flight from certain crimes, RCW 10.95.020(11).

Closer examination of the varied wording of these aggravating factors indicates that the Legislature intended some of them to apply to

any participant in the premeditated murder while others must be applicable to *an individual defendant*. The State submits that it is the Legislature's use of the phrase "*the person*" in setting forth an aggravating circumstance which signals a legislative intent for the circumstance to be assessed against an individualized defendant.

Take for example the aggravating circumstance found in RCW 10.95.020(6):

The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

The unambiguous wording of this aggravating circumstance shows that it pertains to the motivation of the individual defendant and not to the motivation of the defendant's accomplice. The language does not speak of obtaining or advancing someone else's membership or position but only his or her own. Should three people participate in a premeditated murder so that one of them can obtain membership in a group, the aggravating circumstance is applicable only to the one seeking membership.

A much different conclusion is reached, however, when one examines the language of RCW 10.95.020(8), which states:

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

Here there is no reference at all to “the person” or even an indirect reference to the entity committing the murder. This aggravating circumstance assesses the nature of the victim and the general motivation, as opposed to an individualized motivation, behind the crime. These factors do not change from one participant to the next. Once the jury finds the crime falls within the criteria set forth in the aggravating circumstance, it is applicable to all the participants in the premeditated murder and need not be assessed on an individualized basis.

The State submits that to the extent the decision in Howerton stands for the proposition that *any* aggravating circumstance listed in RCW 10.95.020 must be assessed on an individualized basis, it is incorrect. This holding does not properly reflect the intent of the Legislature in enacting the various provisions of RCW 10.95.020. An examination of the wording and the focus of the factual determinations needed for a particular aggravating circumstance will indicate whether it is applicable to all participants in the premeditated murder or whether it must be assessed against an individual defendant. This court should not adopt the analysis of RCW 10.95.020 set forth in Howerton, but rather apply a more careful analysis as to which aggravating factors apply to the crime,

and are therefore applicable to all participants in the crime, and which are applicable to a particular defendant.

Despite the State's disagreement with the entirety of the Howerton opinion, the jury was instructed in this case consistent with its principles. The special verdict form asked the jury to answer four questions and each one began with the words "Did the defendant commit the murder ..." CP 202. Neither the instructions nor the special verdict form referenced an accomplice when discussing the aggravating circumstances. CP 178-201, 202. The jury assessed whether the aggravating circumstances existed on an individualized basis in compliance with Howerton. The jury's findings should be upheld.

3. AFTER THE SUPREME COURT UPHELD DEFENDANT'S CONVICTION FOR PREMEDITATED MURDER AND REMANDED FOR RETRIAL OF THE AGGRAVATING CIRCUMSTANCES, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE PRIOR DETERMINATION OF GUILT WITHOUT CREATING A MANDATORY PRESUMPTION OR COMMENTING ON THE EVIDENCE.

Trial courts are forbidden from commenting upon the evidence presented at trial. Wash. Const. art. VI, sec. 16. A judge comments on the evidence if the comment suggests the judge's attitude toward the merits of the case or the judge's evaluation relative to the disputed issue. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). It is error for a judge to

instruct the jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The purpose of prohibiting judicial comments is to prevent the judge's opinion from influencing the jury. Lane, at 838.

In assessing whether a statement constitutes an improper comment, courts have considered whether the comment was directed at counsel, as opposed to the jury, and was said in legal terms or to explain a ruling, State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898 (1975); State v. Surry, 23 Wash. 655, 660, 63 P. 557 (1900), and whether the court instructed the jury to disregard its comment. Surry, at 661.

Once the defendant demonstrates that the trial judge made a comment on the evidence, the reviewing court will presume the comments were prejudicial; the burden is then on the State to show no prejudice could have resulted from the comment or that no prejudice did result to the defendant. Lane, at 838-839. Washington courts have concluded that judicial comments were harmless in at least three cases. State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006)(“to convict” instructions which stated that the State must prove the defendant had “entered or remained unlawfully in a building, to-wit: the building of [the victim]”; had taken “personal property to-wit: jewelry, from the person or in the presence of another, to-wit: [names of victims]”; and had been “armed with a deadly weapon, to-wit: a .38 revolver,” was harmless error where “[n]o one could realistically conclude that a revolver is not a deadly weapon, an

apartment is not a building, a specifically named person is not someone other than the defendant, and jewelry is not personal property.”); State v. Lane, 125 Wn.2d 825, 840, 889 P.2d 929 (1995) (a judicial comment regarding the credibility of a witness did not prejudice one of the defendants because there was overwhelming untainted evidence supporting his conviction); State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989) (to convict instructions that specified the material alleged to be lewd were harmless beyond a reasonable doubt because other instructions provided a definition of “lewd”).

The cases cited above involve instructions in criminal matters where the jury was tasked with the duty of determining guilt on the substantive offense. A defendant is in a significantly different posture when he is back before the trial court on sentencing issues and his guilt on the substantive offense has been resolved.

In State v. Rupe, 108 Wn.2d 734, 743 P.2d 10 (1987) (Rupe II) the court was reviewing a death sentence which had been imposed by a second jury after remand. Previously, the court had affirmed Rupe's conviction of two counts of aggravated first degree murder and two counts of robbery in the first degree, but had reversed his death sentence because of erroneously admitted evidence in the penalty phase of his trial. State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) (Rupe I). The court remanded for a new sentencing proceeding and a second jury was impaneled for the resentencing trial. It unanimously determined that there

were insufficient mitigating circumstances to merit leniency and returned a verdict for death. In Rupe II, the court approved of the instruction to the second jury which stated:

The question you are required to answer is as follows:
“Having in mind *the crime of which the defendant has been found guilty*, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?”

If you unanimously answer “yes” the sentence will be death. If you do not unanimously answer “yes”, or if you unanimously answer “no” the sentence will be life imprisonment without the possibility of parole.

Rupe II, 108 Wn.2d at 763 (emphasis added). The instruction informs the jury that Rupe had been found guilty even though that particular jury did not determine guilt. This was necessary because of the limited issues that were before the second jury. The second jury was not re-determining the defendant’s guilt, but simply assessing the appropriate punishment for his crimes. Such an instruction did not “direct the verdict” as to Rupe’s substantive guilt, because that issue had been resolved in another proceeding. It is interesting to note that in Rupe II, the court upheld the trial court’s refusal to give Rupe’s proposed instruction which read:

The law makes the defendant a competent witness in this case and you have no right to disregard the testimony of the defendant upon the ground alone that he is the defendant and stands charged with the commission of a crime.

Rupe II, 108 Wn.2d at 764. The Supreme Court noted that “Rupe was not, at this stage of the proceedings, charged with commission of a crime. He

was convicted of that crime.” Id. Thus, instructions that had the effect of portraying Rupe “unconvicted” were inaccurate and properly refused.

While instructions may not be written so that they assume as true material facts which are in issue, Ashley v. Ensley, 44 Wn.2d 74, 265 P.2d 829 (1954), they may be written to indicate facts that have been resolved or are not at issue. See, Rice v. Janovich, 109 Wn.2d 48, 742 P.2d 1230 (1987) (in civil RICO suit trial court could properly instruct the jury that defendants could not deny being members of conspiracy when such claims would be inconsistent with the issues that had been resolved against them in the criminal RICO trial); see also, 6 Washington Pattern Civil Jury Instructions (WPI) §23.01 and §23.02 (admitted liability or directed verdict instructions).

Defendant in this case asserts that court improperly commented on the evidence and essentially directed the verdict by including this language in Instruction No 1:

The defendant has been convicted of the crime of murder in the first degree. You are not to consider the finding of guilt to murder in the first degree as proof of the questions submitted to you on the special interrogatory and the special verdict form.

CP 179, and this language in Instruction No 2, which reads, in part:

The defendant has been found guilty of premeditated murder in the first degree. You must now determine whether any of the following aggravating circumstances exist:

CP 181. Defendant objected to the giving of these instructions. RP 1579-1580.

The given instructions were a proper statements of the law and properly focused the jury on the issues that it had to decide and removed from consideration the issues that had already been resolved. The jury was informed that defendant had been found guilty of premeditated murder. This did not constitute a comment on the evidence because the jury was not tasked with deciding his guilt of the substantive crime. The jury was further instructed that this “finding of guilt” could not be used as “proof” of the aggravating factors. Instruction No 1, CP 179. To decide the aggravating factors, the jury was instructed to consider the evidence that it had heard at trial in “determining whether any proposition has been proved” Id. The instruction did not direct the verdict or create a mandatory presumption with regard to the determination of aggravating circumstances. The existence of the aggravating factors were the only contested issues the jury had to decide. Nor does the instruction convey the judge’s personal feelings toward the issues before the jury.

The language in Instruction No 2 – “*The defendant has been found guilty of premeditated murder in the first degree. You must now determine whether any of the following aggravating circumstances exist*” - serves essentially the same function as the language approved of in Rupe II - “*Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient*

mitigating circumstances to merit leniency?” Instruction No 2. does not constitute a comment on the evidence as it does not convey the judge’s personal feelings regarding the existence of any aggravating factors nor does it direct the jury as to how they should resolve the issues before it.

Defendant has failed to demonstrate that the instructions given below either directed the jury on how to decide the issues before it or conveyed the judge’s personal attitude toward the evidence on the merits of the case. Defendant has failed to meet his burden of showing error.

4. THE TRIAL COURT HAD THE AUTHORITY TO FASHION PROCEDURES TO ALLOW RETRIAL OF THE AGGRAVATING CIRCUMSTANCES AS SUCH A PROCEEDING WAS AUTHORIZED BY THE SUPREME COURT ON REMAND.

A court is not without authority to devise procedures to carry out the tasks assigned to it. RCW 2.28.150 provides that:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

In conjunction with this statutory authority, the court rules provide guidance to the superior court on how to instruct a jury regarding special findings or verdicts. First, the criminal rules require the court to provide “a jury” when the defendant has a right to a jury trial. CrR 6.1(a) (“Cases

required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”). The criminal court rules further allow the court to submit special verdict forms to the jury regarding aggravating circumstances or other necessary factual determinations:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b).

In State v. Davis, 133 Wn. App 415, 138 P.3d 132 (2006), defendant was convicted of harassment, unlawful imprisonment and several misdemeanors. Id. At trial, the court submitted a special interrogatory to the jury asking whether Davis knew or should have known the victim was particularly vulnerable. Id. at 420. The jury found this aggravating factor existed and the sentencing court imposed an exceptional sentence based on this aggravating factor. Id.

On appeal, Davis claimed this procedure violated defendant’s Sixth Amendment right under Blakely v. Washington and State v. Hughes. Id. at 426. Division Three of the Court of Appeals disagreed, concluding that the trial court fashioned a process that conformed to RCW 2.28.150, RCW 9.94A.535, and CrR 6.1(b). Id. at 428. The appellate court reasoned that because: 1) the trial court had authority to submit the

special interrogatory; 2) a jury found the aggravating factor; and, 3) the court properly exercised its discretion to impose an exceptional sentence based on that factor, that there was no Blakely error. Id.

Previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts. See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) (death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977 (1980) (when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury). See also, United States v. Ameline, 376 F.3d 967, (9th Cir. 2004) (post-Blakely holding that federal district courts can impanel juries to decide facts concerning sentencing enhancements despite absence of federal sentencing statute explicitly providing for such a procedure).

Moreover, Washington case law recognizes that when a defendant has a constitutional right to a jury, a jury should be impaneled regardless of whether the right to jury has been incorporated into a statute. For example, Washington's habitual offender statute, RCW 9A.02.030, was amended in 1909 to delete the requirement that a jury decide the defendant's habitual offender status. Despite this deletion of the statutory authority, trial courts regularly impaneled juries to make such determinations for over seventy years. See, State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003); State v. Courser, 199 Wash. 559, 560, 92

P.2d 264 (1939); State v. Fowler, 187 Wash. 450, 60 P.2d 83 (1936). In 1940, the Washington Supreme Court held that there was a constitutional right to a jury in habitual offender proceedings. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), overruled by, State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). Even though the statute was not amended to conform to the holding in Furth, Washington courts continued to recognize that it had the power to impanel juries for habitual offender proceedings. See, State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003).

While the Supreme Court has acknowledged that RCW 10.95.060(3) requires that evidence of the facts and circumstances of the crime from the guilt phase be admissible in the penalty phase where a new jury is impaneled for the sentencing proceeding, it has also stated that “[a]side from the statutory requirement, evidence of the circumstances of the crime is a constitutionally necessary aspect of a jury's decision whether to impose the death penalty” and therefore properly admissible. Rupe II, 108 Wn.2d at 755. This language reflects that the court would have imposed a procedure required by law even if the legislature had failed to provide for one.

Similarly, the school zone/bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and

provide special verdict forms concerning the enhancement. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997).

In Hawkins v. Rhay, this Court found the improper exclusion of jurors for cause due to their opinions on the death penalty, mandated a new sentencing hearing, but not a new guilt phase. 78 Wn.2d 389, 399, 474 P.2d 557 (1970). The court observed that while there was no statutory framework to order a new trial on only the penalty phase, doing so would satisfy the intent of the legislature. Id. at 399-400, citing State v. Davis, 6 Wn.2d 696, 108 P.2d 641 (1940); State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970).

When this case was before the Supreme Court on the first appeal, the Court articulated the status of the case and the possibilities on remand:

We affirm Covell Paul Thomas's conviction in the Pierce County Superior Court for the first degree murder of Richard Geist and his convictions for residential burglary and first degree unlawful possession of a firearm.... We reverse Thomas's conviction for aggravated first degree murder and must reverse his death sentence. We find however, that the errors in the accomplice liability and "to convict" instructions were harmless beyond a reasonable doubt for the purposes of upholding Thomas's underlying convictions for first degree murder and residential burglary. Therefore, *we remand for either a new trial on the aggravating factors or resentencing in accordance with this opinion.*

Thomas, 150 Wn.2d at 876 (emphasis added). Defendant now assert that the Supreme Court did not know what it was doing when it remanded for a new trial on the aggravating factors as such a procedure is not authorized.

As articulated in the above cited law, there is considerable authority that the court may impanel a jury when it has before it an issue that must be decided by a jury. There is statutory authority in RCW 2.28.150; authority under the court rules-CrR 6.16(b) and the considerable case law noted above. The actions of the court below were consistent with the authority given it under these provisions.

Certainly, the trial court had the power to retry the aggravating factors to a jury when the Supreme Court has expressly indicated that such a procedure was permissible in its appellate opinion. 150 Wn.2d at 876.

Defendant relies upon the recent Washington Supreme Court decision in State v. Hughes, 154 Wn.2d 118, 126, 110 P.3d 192 (2005). Hughes was a consolidated appeal of three defendants who each received an exceptional sentences based on aggravating factors proved to the court, not a jury. While their cases were on appeal, the United States Supreme Court issued the decision in Blakely. Each of the defendant's sentences was imposed in violation of Blakely and had to be vacated. On April 14, 2005, the same day that the Washington Supreme court issued its opinion in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), the Legislature passed laws amending the SRA which were designed to "create a new criminal procedure for imposing greater punishment that the standard range" in an effort to "restore the judicial discretion that has been limited as a result of the Blakely decision." Laws of 2005, c. 68, §1. The law went into effect the next day with the Governor's signature. But the

decision in Hughes was written without knowledge of the Legislature's response to Blakely. With no indication as to how the Legislature might change the sentencing procedures in reaction to Blakely, the court was faced with the issue of what remedy should be available on remand.

The Hughes case involved a completed trial where a jury had already determined defendants' guilt. Allowing the trial court to impanel a sentencing jury on remand created many obstacles for the Supreme Court to tackle. Such a remedy on remand required the court to authorize trial courts to use a sentencing procedure directly in conflict with that provided in the SRA at that time. Id. at 151-52. Additionally, such a remedy would require the court to authorize trial courts to submit technical and legalistic aggravating factors to the jury when it was "different to conceive that the legislature would intend to desire for lay juries to apply them." Id. at 151.

The Hughes court concluded that a jury could not be impaneled on remand to find aggravating factors warranting an enhanced sentence because the SRA did not provide for such a mechanism; the court opted not to create a procedure out of "whole cloth." Id. at 151-152. The court in Hughes held that the proper remedy in this circumstance is vacation of the sentence and remand for imposition of a standard range sentence. Id. at 126, 154.

Against this backdrop, the defendant argues that the trial court exceeded its authority by impaneling a jury to consider whether

aggravating factors existed for aggravated murder. The defendant reads more into Hughes than is warranted.

Hughes is not the absolute prohibition on judicially implied procedures for imposing sentence enhancements that defendant claims. In Hughes, the court considered the statutory procedure for imposition of exceptional sentences. The legislature had not failed to provide a procedure; it had instead specifically provided that a judge, not a jury, must find the facts to impose such a sentence. Hughes, 154 Wn.2d at 148-49, 151. When it declared the legislature's specified procedure unconstitutional because a jury must instead find those facts, the court was unwilling to create a procedure completely opposite from that created by the legislature. Hughes, 154 Wn.2d at 150, 151-52.

Here, defendant's situation is different. He does not claim that the legislature created a system inconsistent with that used by the trial court in his case. Washington law has always required a jury to find the existence of aggravating circumstance for aggravated murder. The procedures used on remand do not conflict with this longstanding practice. Even under Hughes, courts were allowed to "imply a necessary procedure" when "a statute merely is silent or ambiguous." Hughes, 154 Wn.2d at 151. Moreover, the Hughes court emphasized the limited nature of its holding: "We are presented only with the question of the appropriate remedy on remand-we do not decide here whether juries may be given special verdict

forms or interrogatories to determine aggravating factors [for exceptional sentences] at trial.” Hughes, 154 Wn.2d at 149.

Defendant also contends that nothing in RCW 10.95 et. seq. provides for the procedure employed by the trial court on remand. This is not surprising. Except for RCW 10.94.040 which sets forth the procedure for filing a notice of special sentencing proceeding, the provisions of RCW 10.95 et. seq. discuss the procedures to be employed *after* a criminal defendant has been found guilty of aggravated murder in the first degree. Once the Supreme Court vacated the finding of aggravating circumstances on direct appeal and remanded it to the trial court, defendant’s case was not yet under the provisions of RCW 10.95.

The Supreme Court held that the State could retry defendant on the aggravating circumstances; the trial court employed proper procedures to carry out this directive. If defendant believes the Supreme Court was in error with regard to its holding in the prior appeal, it should have sought reconsideration in that court.

5. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION IN DENYING THE DEFENSE
CHALLENGE TO THE STATE’S EXERCISE OF
ITS PEREMPTORY CHALLENGE AGAINST
JUROR NO. 33.

In Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court held that the State's privilege to strike individual jurors through peremptory challenges is subject to the

commands of the Equal Protection Clause. Six years later in Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), the court extended this principle to peremptory challenges exercised by a criminal defendant as well, reasoning, “[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same-- in all cases, the juror is subjected to open and public racial discrimination.” Id. at 49.

Batson and its progeny utilize a three-part test to determine whether a peremptory challenge is race based:

[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

In deciding whether step one has been met, the court in Batson “held that a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives ‘rise to an inference of discriminatory purpose.’” Johnson v. California, 545 U.S. 162, 169, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005), quoting Batson, 476 U.S. at 94. To satisfy his burden, a defendant may rely solely on the facts concerning the selection of the venire in his case. Batson, 476

U.S. at 95. The Supreme Court has declined to require proof of a pattern or practice because a single invidiously discriminatory governmental act is not rendered less harmful by the fact that it is not one in a series of discriminatory acts. Johnson, 545 U.S. at 169; Batson, 476 U.S. at 95. The Court has given the following guidance as to how a defendant might establish a prima facie showing:

[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (citations omitted) (quoting Avery v. Georgia, 345 U.S. 559, 562, 73 S. Ct. 891, 97 L. Ed. 1244 (1953)).

If the court finds a prima facie showing, then it will ask the prosecutor for an explanation. Should the prosecutor volunteer a race-neutral explanation before the trial court rules on whether the defendant has made out a prima facie case, and the trial court then rules on the ultimate question of racial motivation, the preliminary prima facie case

evaluation is unnecessary. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

Going to the second step marks a shift in the burden of production but not of the burden of persuasion. The burden of persuasion “rests with, and never shifts from, the opponent of the strike.” Purkett, 514 U.S. at 768. In assessing the second step, the trial court is guided by the following cautionary instruction: “The second step of this process does not demand an explanation that is persuasive, or even plausible.” Purkett, 514 U.S. at 767-68; see also, State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001). While the proponent must have legitimate reasons for exercising the strike, this is not the same as stating that the proffered reason must make sense; the constitution requires only that it be a reason that does not deny equal protection. Purkett, 514 U.S. at 768-769 (“Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral.”).

The court has described the process as the “first two Batson steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim.” Johnson, 545 U.S. at 171. In the third step, the court weighs the persuasiveness of the justification and “determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.” Purkett, 514 U.S. 768.

One division of the Court of Appeals has established circumstances for the court to consider in making its determination: (1) striking a group of jurors sharing race as the only common characteristic; (2) disproportionate use of strikes against a group; (3) the level of the group's representation in the venire as compared to the jury; (4) race of the defendant and the victim; (5) past conduct of the prosecutor; (6) type and manner of the prosecutor's voir dire questions; (7) disparate impact of the challenges; and (8) similarities between the individuals who remain on the jury and those stricken. State v. Evans, 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000).

The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. ...The three-step process thus simultaneously serves the public purposes Batson is designed to vindicate and encourages "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process."

Johnson v. California, 545 U.S. at 172-173 (2005)(citations omitted)

A trial court's determination is accorded great deference on appeal, and will be upheld unless clearly erroneous. Hernandez, 500 U.S. at 364; Luvane, 127 Wn.2d at 699.

Defendant asserts the State's use of a peremptory challenge upon Juror No. 33 was discriminatory. Brief of Appellant at pp. 46-50. The

court did not find that the prosecution acted improperly challenging this juror. RP 121-122. The record does not demonstrate an abuse of discretion on this ruling.

During voir dire, defense counsel was asking about whether the venire thought it was human nature that people made quick judgments based on appearances. RP (supp) 3.³ To this question Juror 33 responded:

Juror 33: I think that's a stupid statement. I mean Ted Bundy, did he look guilty? Jeffrey Dahmer, next-door neighbor, did he look guilty or act guilty? That's more of a racist statement than anything else. I mean, look at this jury pool. Look at that. Is this really a makeup of Tacoma or Pierce County? This is bizarre, man.

...

You have more dark in the bailiff than we have in this jury pool, and that's the way the prosecutors want it.

RP(supp) 7. The prosecutors used their fourth peremptory challenge on Juror No. 33. CP 247; RP 119. The record indicates that Juror No. 33 was the lone "easily recognizable" African-American in the venire panel. RP 119, 120, 122.

Defendant argued that the fact that the prosecution had eliminated the only African-American from the panel demonstrated a discriminatory

³ The verbatim report of proceedings consists of eighteen volumes. Seventeen of the volumes have consecutively numbered pages. Cites to these volumes are designated "RP." The one remaining volume is nine pages in length, consisting of excerpts of the voir dire process that pertain to Juror 33. These excerpts occurred on October 27, 2005 and that date appears on the on the first page of this supplemental volume. It is being referred to by both appellant and respondent as "RP (supp)."

purpose. RP 119. The State, without being asked to do so by the court, offered its reason for challenging Juror No 33:

Prosecutor: Juror 33 observed the lack of what he believed was a racial cross representation ...because there was, at least in his view, there weren't very many representatives of his race. It was the comment after that, the rather forceful comment, that was made that "the prosecution would like it that way," and his comments during that – those few moments he was speaking, clearly was hostile toward the State, a clear indication that the State had somehow brought this particular group of people together with a lack of minority representation...given the demonstrated hostility that I think the Court had observed and that sort of force with which this was made...the State felt that that juror could not give the State a fair trial.

RP 120-121. The prosecutor also asked the court to express its observations of the juror's manner and tone when making the comments.

RP 121. The court responded:

Court: I heard the statements made by Juror No.33...and I was alerted to his strong conviction or strong thought about the issue of race being an issue in this case, and I say that because he used words like "this is a joke," he referred to this –the system as being a joke because he was the only African American on the venire, I think. And that, to me indicated that he was very much – he had already made up his mind as to how he felt about the system and how unfair it is, and I don't think that from what he was saying that he could be fair to ...the State if he feels that bad about it.

RP 122. The court denied that Batson challenge. RP 122.

Juror 33 demonstrated animosity toward the State and assumed the prosecution would be happy with a lack of minorities in the venire panel, thereby attributing to the prosecution a bigoted and prejudiced mindset. It

is not unreasonable for a party to seek to excuse a potential juror who is verbalizing his animosity. His comments also demonstrated a lack of faith in the integrity of the criminal justice system implying that the selection of the jury pool was somehow being manipulated to exclude minorities. From this record it is clear that the prosecutor used a peremptory challenge on Juror No. 33 because of his attitudes toward the criminal justice system and the prosecution rather than because of the color of his skin. The court's reaction to the juror's comments was comparable to the State's. This record indicates a proper race-neutral reason for the challenge and the court did not abuse its discretion in denying the challenge.

Defendant argues that the court erred by "ruling that the exercise of a single peremptory challenge cannot violated equal protection." Brief of Appellant at p. 49. The court below did refer to State v. Ashcraft for the proposition that "the exercise of a single peremptory challenge to remove one black juror is not prima facie evidence of purposeful discrimination as it does not establish a pattern of exclusion" thereby requiring the State to give a race neutral explanation for the challenge. RP 122. The State would agree that a Batson challenge can be properly raised after exercise of a single peremptory challenge against a minority or protected class. However, it is also true that a single peremptory challenge to a minority juror does not always establish prima facie evidence of purposeful discrimination. The record demonstrates that the primary reason for the court's ruling was because its assessment of Juror No. 33's

comments was consistent with the prosecution's stated reasons for excusing Juror No. 33. The court thought that Juror No. 33 would not be fair to the prosecution. This demonstrates an appropriate use of a peremptory challenge –to remove a biased juror. The court did not abuse its discretion in denying the Batson challenge.

6. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION IN MAKING ITS
EVIDENTIARY RULINGS.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610, 632 (1990); State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative

value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). For example, in State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), the court held that Hettich could not raise a Frye objection on appeal because he did not make a Frye objection at trial.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331, review denied, 127 Wn.2d 1018 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

In the case now before the court, defendant claims that the trial court made three errors in admitting evidence. Defendant challenges 1) the admission of testimony setting forth the numbers recorded on the victim's pager; 2) the admission of Rembert's statement to his girlfriend as an excited utterance; and 3) the admission of alleged 404(b) evidence. As will be discussed below all of these claims are without merit.

- a. The court did not abuse its discretion overruling defendant's objection to testimony regarding the numbers found on the victim's pager as this was not hearsay.

"A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a). Under Evidence Rule 801(c) "hearsay" is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The term "assertion" in this context requires that the evidence offered be an assertion of some fact and requires that the actor actually intended the communication to be an assertion. The "matter asserted" is the matter set forth in the writing or speech on its face, not the matter broadly argued by the proponent of the evidence. In re Pers. Restraint of Theders, 130 Wn. App. 422, 432, 123 P.3d 489 (2005).

In a State v. Collins, a court allowed testimony about an outside caller who called the defendant's telephone and made statements indicative

of a desire to buy controlled substances. The caller's statements were admissible to show the caller's implicit belief that the defendant had something the caller wanted. State v. Collins, 76 Wn. App. 496, 499, 886 P.2d 243 (1995). The appellate court ruled that an out-of-court statement indicative of a desire to buy controlled substances was not hearsay if it was used to show the caller's belief that the caller could buy controlled substances from the defendant, rather than to show that the caller wanted to buy controlled substances. The court explained at length:

Verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, is excluded from the definition of hearsay. "The key to the definition is that nothing is an assertion unless intended to be one." A person does not normally intend to assert an implied belief. Thus, the statements of the callers were not hearsay in the manner they were used at trial, and the court did not err in admitting them.

Collins, 76 Wn. App. at 499 (internal citations omitted). This concept is discussed by Tegland in his Courtroom Handbook on Washington Evidence, 2006, at p. 370. In making the distinction between assertive and nonassertive statements, he notes that if there is no assertion of a fact the matter is outside of the hearsay definition. If the declarant is, for example, simply communicating a request or an instruction, that is not an assertion of a fact.

In State v. Fish, 99 Wn. App. 86, 992 P.2d 505 (1999), the State offered evidence that the declarant requested the driver of a vehicle "pull over" and "drop off" the passenger. The court stated that this was not a

statement of fact and therefore not hearsay. The request or instruction to the driver was not an assertion of a fact, just a statement of request or instruction

If in fact the evidence does not constitute an assertion, then it is not hearsay and its admissibility is governed by the rules of relevance. State v. Modest, 88 Wn. App. 239, 944 P.2d 417 (1997). In Modest the State offered a telephone statement into evidence to rebut defense witness claims that the defendant had not made several telephone calls from the jail to witnesses. The court reiterated that a matter is only hearsay if it is intended to be assertive.

Hearsay evidence is any assertion offered in evidence to prove the truth of the matter asserted. Accordingly, any spoken word, writing or nonverbal conduct that is not intended to be assertive is not hearsay. Clearly a telephone bill is not an assertive statement and is not excludable as hearsay. The admissibility of nonassertive statements as circumstantial evidence of a fact in issue is governed by principles of relevance rather than hearsay.

Id., at 248-249 (citations omitted).

In People v. Fields, 61 Cal. App 4th 1063, 72 Cal.Rptr 2d 255, the court held that a telephone number appearing on a pager in defendant's possession was not hearsay. Fields was charged with selling cocaine. Undercover officers approached a cocaine dealer, McClain, and tried to make a purchase. McClain stated he would need to make a phone call and went to a nearby pay phone. McClain made the phone call and then hung up. A short time later the pay phone rang and McClain answered. The

officers gave McClain \$20, who walked a short distance away and met up with Fields who was in a gray Honda. Fields gave an item to McClain, who subsequently delivered cocaine to the two undercover officers. Officers stopped the Honda and arrested Fields. Fields was carrying a pager and an officer made a record of each of the pages listed on it. One of the numbers on the pager matched the number of the pay phone where McClain had placed the call. During trial, police were permitted to offer the number on the pager as circumstantial evidence that the defendant had called McClain back after receiving the page. The defense argued that this was inadmissible hearsay. The court disagreed, concluding that such evidence is not hearsay unless that conduct is clearly assertive in character. *Id.*, at 1068. The court found that information in the form of a phone number from this pager was not within the hearsay rule as it was not an “assertion,” and was relevant circumstantial evidence of a relationship between the defendant and McClain.

In the case at bar, defendant objected to the State adducing testimony as to the numbers that were on the victim’s pager, which police found near his body. RP 1171. The matter had been briefed by both parties. RP 1171-1172. Of particular concern to the defense was the information that accompanying one of the numbers on the pages was a code “54.” Other testimony indicated this was a code that defendant used to identify himself. RP 219. After considerable argument, the court found that numbers on the pager did not constitute assertive conduct and was not

hearsay. RP 1192-1193. The court found that the information was relevant and allowed it into evidence. Id. The evidence was later adduced before jury. RP 1214-1219. Defendant again contends on appeal that this was improper hearsay evidence.

The court was correct in finding that this was not hearsay.

The act of paging another individual is not an assertive act. As discussed above, the “matter asserted” is the matter set forth in the writing or speech on its face, not the matter broadly argued by the proponent of the evidence. Defendant must show that “473-4109-54” is an assertive act. The State did not admit the evidence to prove the truth of “473-4109-54,” whatever that would mean. When one dials a pager number, waits for the tone, then inputs a phone number, that is not an assertion of fact. It is at most a request that the recipient contact the caller at the number provided. It would be the equivalent of a statement “Would you please call Covell Thomas at 473-4109.” Similar to the request made in Fish or the examples provided by Teglund, communicating a request or an instruction is not an assertion of a fact. The evidence was not hearsay and was properly admitted.

Defendant argues that it is hearsay because it is being used to imply a second assertion, i.e. that the defendant contacted Mr. Geist by pager. However, proof of one fact (the defendant's number being on Geist's pager) is not hearsay when offered to prove the second implied assertion (that the defendant contacted Geist by pager.). See, State v.

Crowder, 103 Wn. App 20, 11 P.3d 828 (2000). Moreover, the flaw in defendant's argument that "54" was used to prove that he called Geist and wanted Geist to call him back is that, even if that were true, it would not constitute hearsay. ER 801(d)(2)(i) provides that statements of a party offered by the party's opponent are exempted from the hearsay rule.

Defendant has failed to show any abuse of discretion in the admission of this evidence.

- b. The admission of Rembert's excited utterance to Azevedo is controlled by the law of the case.

As argued above, the "law of the case," doctrine restricts the parties and the trial court; both are bound by the holdings of an appellate court on a prior appeal until such time as they are "authoritatively overruled." Greene v. Rothschild, 68 Wn.2d at 10. A holding should be overruled only if it lays down or tacitly applies a rule of law which is clearly erroneous. Id.

In the first appeal, defendant contended that Rembert's statement to his girlfriend, Azevedo, to the effect that defendant had shot Geist was improperly admitted as an excited utterance.⁴ The majority of the court upheld the trial court's ruling on this issue. Thomas, 150 Wn.2d at 853-856. Three judges dissented from this portion of the ruling on the grounds

⁴ This evidence was adduced at RP 1047.

that too much time had elapsed, with too many intervening events, between the startling event and the statement for it to qualify as an excited utterance. Thomas, 150 Wn.2d at 877-880. The dissent discussed the decision in a State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992), which upheld a reversal of the trial court's ruling finding an excited utterance when the startling event had happened a "day or so" earlier and there was evidence that the declarant had been calm in the intervening time.

Thus it is clear that the holding of Chapin was before the Supreme Court at the time of the first appeal and the majority of the court found that it did not control the admission of Rembert's excited utterance. A majority of the court found that the statement had been properly admitted. Defendant fails to articulate why the law of the case doctrine does not govern this ruling. He has not articulated or provided any authority that there has been a change in the law which "authoritatively overruled" the court's earlier decision. When defendant tried to reassert his hearsay objection to this evidence below, the court found that it was controlled by the prior ruling and opinion. RP 983, 1045-1046. The court did not abuse its discretion in applying the law of the case.

- c. Defendant failed to preserve his claim regarding the admission of improper 404(b) evidence by failing to object on that basis in the trial court.

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule's list of purposes for which evidence of other crimes or misconduct may be admitted is not intended to be exclusive. State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

Prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

Admission of evidence under ER 404(b) is reviewed for abuse of discretion. State v. Hernandez, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000)(citing State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)). Erroneous admission of ER 404(b) is

not error of constitutional magnitude, and may not be raised for the first time on appeal under RAP 2.5(a). State v. Everybodytalksabout, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002).

Defendant challenges the admission of some of Alexandra Toomah's testimony, which convey her understanding that defendant had made threats to kill Lynette and her baby, as constituting improper ER 404(b) evidence. Brief of appellant at p. 54. Defendant did not make an objection on this basis in the trial court and did not preserve this issue for appellate review. RP 383-386. Defendant did object below, but the stated basis for the objection was "relevancy." RP 383. During the ensuing colloquy, outside the presence of the jury, defendant also made argument that could be construed as objecting on the grounds of "hearsay" or "lack of personal knowledge," but nothing that articulates an objection on the grounds that the State is adducing evidence of "bad acts" or that the prejudicial value of this evidence exceeds its probative worth. RP 384-385. A relevancy objection does not preserve an ER 404(b) issue for appellate review. See, State v. Kendrick, 47 Wn. App. 620, 634, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987). Defendant cannot raise a ER 404(b) challenge for the first time on appeal.

Additionally, defendant cannot show that admission of the challenged evidence was harmful to him. The court expressly instructed the jury that the evidence was not being admitted for the truth of the matter asserted, but for the jury to assess the witness's state of mind as to

why she delayed reporting the murder to the police. RP 386-387. The record does not indicate an abuse of discretion.

Moreover, the evidence was cumulative of other testimony which has not been challenged on appeal. Lynette testified that defendant had threatened to kill both her and her son if she told or left. RP 274. Defendant has not challenged the admission of Lynette's testimony. Thus, defendant fails to articulate how the admission of Ms. Toomey's testimony can be harmful when it is merely cumulative of properly admitted evidence. Defendant has failed to show any prejudicial error.

7. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neder v. United States, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a

perfect one, for there are no perfect trials.” Brown v. United States, 411 U.S. 223, 232 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also, State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); see also State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. State v. Russell, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First,

there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. Id. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See, e.g., Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that *no prejudicial* error occurred.”) (emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error) and State v. Kinard, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for

truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see, e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of state witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated some so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his sentencing proceeding was so flawed with prejudicial error as to warrant relief.

D. CONCLUSION.

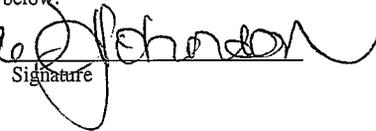
For the foregoing reasons the State asks this court to affirm the judgment below.

DATED: OCTOBER 24, 2006

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Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/24/06 
Date Signature

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